

**Employment Screening for Criminal Records:  
Attorney General's Recommendations to Congress**

**Comments of the  
National Employment Law Project to the  
U.S. Attorney General, Office of Legal Policy  
(OLP Docket No. 100)**

**August 5, 2005**

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**Summary of Recommendations**

We appreciate this opportunity to comment on the Attorney General's initiative to evaluate the nation's polices related to criminal background checks conducted for employment purposes and to make recommendations for reform to Congress. (70 Fed.Reg. 32849, June 6, 2005).

As an organization that promotes labor protections for the working poor, the National Employment Law Project (NELP) appreciates this opportunity to comment on this important initiative to evaluate federal policy related to employment screening for criminal records. NELP's Second Chance Labor Project works with advocates, policy makers and people with criminal records to ensure a more fair and effective system of employment screening for criminal records. The Project seeks to protect public safety and security while promoting the rehabilitative value of work and the basic employment rights of all workers, including those with criminal records.

**I. Policy Recommendations**

Section 6403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004 [P.L. 108-458] broadly mandates the Attorney General to "make recommendations to Congress for improving, standardizing, and consolidating the existing statutory authorization, programs, and procedures for the conduct of criminal history record checks for non-criminal justice purposes." In addition to 14 specific policy themes identified by Congress, the Department is authorized to make recommendations related to "any other factors that the Attorney General determines to be relevant to the subject of the report." (Section 6403(d)(15)).

**A. Adopt Employee Protections Necessary to  
Compensate for the Expanded Reliance on Criminal Records**

The federal law specifically calls on the Attorney General to make recommendations related to "privacy rights and other employee protections." (Section 6403(d)(5)). We strongly support policies to expand procedural rights in federal laws designed to ensure that criminal records are complete and accurate while also protecting privacy. In addition, we urge the Department to promote substantive employee protections that determine the appropriate limits on the scope of criminal background checks.

**1. Adopt substantive worker protections defining the proper scope of federal and state employment prohibitions based on criminal records.**

The Attorney General should recommend that Congress adopt the following substantive employee protections regulating employment disqualifications in federal and state laws based on an individual's criminal record. (Sections 6403(d)(5), (15)).

- Establish threshold federal standards regulating when to apply new screening requirements and employment prohibitions based on a criminal record, taking into account public safety and security, individual and civil rights.
  - Absent special circumstances, new employment prohibitions based on an individual's criminal records should only apply prospectively, not to current workers.
  - Disqualifying offenses should be time limited, and lifetime disqualifications should be eliminated except in special circumstances.
  - All workers with disqualifying offenses should be provided an opportunity to establish that they have been rehabilitated and do not pose a safety or security threat.
  - Employment prohibitions imposed by federal law should "directly relate" to the responsibilities of the occupation, thus especially broad categories of offenses should be more closely scrutinized (including blanket felony disqualifications and broad categories of drug offenses and other non-violent crimes that disproportionately disqualify people of color).
- 2. Adopt stronger procedural rights to ensure that employment decisions are based on more complete criminal records while also protecting the individual worker's privacy.**

We urge the Department to adopt the following recommendations to strengthen the procedural guarantees designed to ensure that criminal records are complete and reliable and that their privacy is adequately protected.

- Create additional safeguards against adverse employment decisions and discrimination based on incomplete criminal records, including a one-year limit on arrests with no dispositions. (Sections 6403(d)(5), (8), (12)).
- Federal procedural protections should be significantly strengthened by making the FBI's information available to all those who produce a criminal record while also clarifying that the opportunity to correct the individual's record should be available *before* an adverse employment determination is made by any authorized agency or employer. (Sections 6403(d)(5)(B), (15)).
- Consistent with current federal practice, fingerprints collected for employment and licensing purposes should be destroyed and not retained by the FBI. (Section 6403(d)(5)(C)).

**B. Strictly Limit the Scope of Private Employer Access to Federal Criminal Record Information**

We urge the Attorney General to recommend that Congress limit, not expand, the authority of private employers to request and review national records. (Sections 6403(d)(7), (9)).

Expanding the authority of private employers to request and review FBI criminal records absent state laws creates a significant potential for error and abuse by employers which will unfairly penalize the nation's workers. Thus, the employer's role should be limited to receiving the standard results of a "fitness determination" from the appropriate agency that reviews the FBI criminal records pursuant to state or federal employment and licensing laws.

**C. Employers, Not Workers, Should Absorb the Fees Requiring or Authorizing a Criminal Records Search for Employment Purposes**

Federal laws authorizing employers to request FBI criminal records should direct that the employer pay the full costs of the fingerprinting and processing of the criminal records, while also precluding employers from seeking to recoup the fee, either directly or indirectly, from the worker's compensation. (Sections 6403(d)(7), (10)).

Absent these protections, the significant fees associated with fingerprint-based criminal records searches will impose a financial hardship on working families, especially on the many new categories of low-wage, entry-level workers who are now required to be fingerprinted and screened for criminal records. In addition, the absence of federal laws regulating who pays for the criminal records search often leads to fees being passed on workers and to inequitable treatment of similarly-situated individuals from different states.

**D. Federal and State Agencies Should Devote Their Limited Resources to Strengthening the Infrastructure to Produce Reliable Criminal History Information, Not Rely on Commercial Providers of Criminal History Data and Screening Services**

We urge the Department to adopt the following recommendations which strictly limit, not expand, the functions of commercial firms as they relate to employment screening of criminal histories required by federal and state laws.

- Commercially-available databases should not be used to supplement the FBI criminal history information because of serious questions related to their accuracy and the industry's lack of compliance with privacy protections. (Section 6403(d)(1)).
- Because the demands to comply with new employment screening mandates require a strategic investment in the federal and state infrastructure, Congress should revisit the FBI's recent guidance authorizing governmental agencies to outsource sensitive screening functions involving the FBI's criminal records system. (Section 6403(d)(13)).

**Comments of the  
National Employment Law Project to the  
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We are writing in response to the Attorney General's request for comments related to criminal background checks conducted for employment and licensing purposes. (70 Fed.Reg. 32849, June 6, 2005).

As an organization that promotes employment opportunities and labor protections for the working poor, the National Employment Law Project (NELP) appreciates the opportunity to comment on this important initiative to evaluate federal policy related to employment screening for criminal records. NELP's Second Chance Labor Project works with advocates, policy makers and people with criminal records to ensure a more fair and effective system of employment screening for criminal records. The Project seeks to protect public safety and security while promoting the rehabilitative value of work and the basic employment rights of all workers, including those with criminal records.

**I. The Attorney General's Broad Congressional Mandate**

Section 6403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004 [P.L. 108-458] broadly mandates the Attorney General to "make recommendations to Congress for improving, standardizing, and consolidating the existing statutory authorization, programs, and procedures for the conduct of criminal history record checks for non-criminal justice purposes."

The statute lists 14 factors that the Department must consider in making these recommendations to Congress. These factors cover not only federal policies, but also recommendations related to state policy, private employment and the private entities in the business of providing criminal history information for employment purposes. In addition, the Department is authorized to consider "any other factors that the Attorney General determines to be relevant to the subject of the report." (Section 6403(d)(15)).

Finally, the Department is required to consult with state and federal officials, "appropriate representatives of private industry, and representatives of labor, as determined appropriate by the Attorney General." (Section 6403(e)). According to the Department's Federal Register notice, public comments are being solicited "to provide a means of input to these named parties, and to allow for broader public input on the issues that will be addressed in the report . . ." (70 Fed. Reg. at 32849).

**II. Recommendations for Federal Priorities**

The practice of employment screening for criminal records has reached a critical juncture nationally and in the states, thus requiring an informed evaluation of existing policies and options

for reform as mandated by Congress.<sup>1</sup> These developments have been driven by the renewed concern for national security and for public safety in occupations serving especially vulnerable populations. Given the scope of the federal mandate, we begin by describing the overriding concerns which we urge the Department to incorporate as a framework for responding to the specific policy challenges identified by Congress.

**A. The unprecedented volume of criminal records checks elevates the risk of error and abuse of the employment screening process, thus requiring expanded privacy, civil rights and basic employee protections.**

In 2002, for the first time, the FBI performed more fingerprint-based background checks for civil purposes than for criminal investigations.<sup>2</sup> In the past ten years, the number of civil requests for criminal records has more than doubled, exceeding 9 million in 2004. In 2004, nearly 5 million of the FBI criminal records requests were conducted specifically for employment and licensing purposes.<sup>3</sup>

State criminal records checks for employment and licensing purposes have also expanded as a result of the many new laws mandating criminal background checks of workers employed in a broad range of occupations and industries. For example, in California alone, about 1.5 million state criminal records checks were conducted last year pursuant to state laws, which accounts for roughly one in ten California workers employed in hundreds of occupations. In addition, criminal background checks conducted by private screening firms have increased at a record rate, with 80% of large employers in the U.S. now screening their workers for criminal records (an increase of 29% since 1996).<sup>4</sup>

These new screening policies potentially impact one in five adults in the United States who have a criminal record on file with the states.<sup>5</sup> As the Equal Employment Opportunity

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<sup>1</sup> In addition, the National Consortium for Justice Information and Statistics (SEARCH) has initiated a major review of the issue with the creation of a Task Force with the Bureau of Justice Statistics to examine "America's expanding criminal record backgrounding culture." The Task Force will "take a close look at the four issues likely to determine whether history will judge America's emerging backgrounding culture as a good or bad thing," including: 1) "clarity" of what is considered a background check; 2) "reliability" of the information produced; 3) the "relevancy" of specific disqualifying crimes; and 4) the "fairness" of the system, responding to whether the system can "ensure that backgrounding doesn't disparately impact minorities; will not snuff out chances for reintegration; be misused; or will not smother the values that nourish democracy-anonymity, privacy and freedom?" SEARCH News, "BJS/SEARCH Task Force Examines America's Expanding Criminal Record Backgrounding Culture" (2004).

<sup>2</sup> Steve Fischer, FBI, Criminal Justice Information Services Division, Office of Multimedia, Response to Information Request from Maurice Emsellem, National Employment Law Project (dated July 22, 2005). From 2002-2004, the number of fingerprint-based criminal records requests increased sharply, thus they again exceeded the number of civil requests in 2004 (9.6 million criminal requests, compared with 9.1 million civil requests).

<sup>3</sup> Id.; "Job Seekers Increasingly Fingerprinted: Background Checks Give Rise to New Technology, Mixed Reviews," *Wall Street Journal* (June 13, 2005).

<sup>4</sup> Press Release, "SHRM Finds Employers are Increasingly Conducting Background Checks to Ensure Workplace Safety," (Society for Human Resources Management, January 20, 2004).

<sup>5</sup> According to the latest state survey, there are 64.3 million people with criminal records on file with the states, including serious misdemeanor and felony arrests. Bureau of Justice Statistics, *Survey of State Criminal History Systems, 2001* (August 2003), at Table 2. Because of over counting due to individuals who have records in multiple states and other factors, to arrive at a conservative national estimate we reduce this figure by 30% (45 million). Thus, as a percentage of the U.S. population over the age of 18 (209 million according to the 2000 Census), an estimated

Commission (EEOC) concluded, excessive reliance on criminal records can also produce adverse employment decisions that have a discriminatory impact on African-Americans and Latinos who are far more likely to have had contact with the criminal justice system.<sup>6</sup> And despite the best efforts of government officials, criminal records checks also impose a hardship on thousands of workers who have never committed a crime when they become the victims of identity theft, “false positives” routinely generated by name-based criminal records checks, and delays often produced by the poor quality of images collected for fingerprint-based checks.

Given the unprecedented volume of national, state and private industry criminal records checks for non-criminal justice purposes, we urge the Attorney General to give special weight in its recommendations to Congress to the full range of privacy, civil rights and basic employee protections to guard against the elevated risk of error and abuse involving the livelihood of millions of working families.

**B. In order to more effectively promote public safety, new federal policies must also limit unwarranted barriers to employment for people with criminal records and protect current workers.**

The unprecedented reliance on employment screening for criminal records is largely driven by the nation’s fundamental concern for security against terrorism, public safety and the protection of especially vulnerable populations, including the elderly and children.

However, a broad consensus has also developed among policy makers, criminal justice professionals, and communities hit hard by crime, that far more should be done to reduce recidivism -- and thereby increase public safety -- by creating job opportunities for the record numbers of people leaving prison. President Bush, in his 2004 State of the Union address, joined in support of this cause, stating “We know from experience that if [former prisoners] can’t find work, or a home, or help, they are much more likely to commit more crimes and return to prison . . . America is the land of the second chance, and when the gates of the prison open, the path ahead should lead to a better life.”

Thus, federal legislation has been introduced with bi-partisan support (Second Chance Act of 2005, H.R. 1704) seeking to reduce recidivism in the participating states by 50% over 10 years. A key element of the strategy is to reduce unwarranted barriers in laws that limit the job opportunities of people with criminal records. Accordingly, the federal bill (Section 3(f)(4)(A)) requires participating states to make “recommendations with respect to laws, regulations, rules and practices that: disqualify former prisoners from obtaining professional licenses or other requirements necessary for certain types of employment, and that hinder full civic participation. . . .”

In addition, the bi-partisan Re-Entry Policy Council recently expressed concern for the role of employment barriers in federal and state laws, thus recommending that policy makers conduct a “review of employment laws that affect employment of people based on criminal history, and

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21.5% of the U.S. population has a criminal record on file with the states.  
6 EEOC Guidance, No. N-915-061 (September 7, 1990).

eliminate those provisions that are not directly linked to improving public safety.”<sup>7</sup> Similarly, the American Bar Association, adopting the recommendations of the Justice Kennedy Commission, recently urged the federal government to “limit situations in which a convicted person may be disqualified from otherwise available benefits, including employment, to the greatest extent consistent with public safety.”<sup>8</sup>

These respected authorities are responding to the staggering numbers of people now leaving prison and looking for work. A record 656,000 people were released from prison last year, and two-thirds of them have served time for non-violent offenses, mostly for drug and property crimes.<sup>9</sup> Access to meaningful employment, including many of the entry-level occupations now regulated by state and federal employment prohibitions, is critical to their successful “reentry” to society. The more they are denied access to jobs, the greater the risk of recidivism and crime, which impacts all of society but especially those low-income communities where they return in large concentrations. A steady job can make all the difference in turning an individual’s life around and contributing to the safety and security of the community.<sup>10</sup>

Accordingly, the Attorney General’s recommendations to Congress should be carefully tailored to promote public safety *both* in the workplace and in those communities hit hard by crime, thus taking into account the impact of employment prohibitions in screening laws on the economic opportunities of people with criminal records.

### **III. Specific Policy Recommendations**

The following comments respond more specifically to the factors that the Attorney General must consider in making policy recommendations to Congress for reforms related to employment screening for criminal records. In addition, we urge the Department to adopt several related recommendations based on its authority to consider “any other factors that the Attorney General determines to be relevant to the subject of the report.” (Section 6403(d)(15)).

#### **A. Employee Protections Necessary to Compensate for the Expanded Reliance on Criminal Records**

The federal law specifically calls on the Attorney General to make recommendations related to “privacy rights and other employee protections,” while also referencing several procedural protections, such as access to the criminal record when employment is denied and appeal mechanisms. (Section 6403(d)(5)). We recommend policies to expand procedural protections in federal laws designed to ensure that criminal records are complete and accurate and promote privacy (Section III.A.2). In addition to these procedural protections, we urge the Department to adopt recommendations incorporating key substantive employee rights (Section III.A.1) to determine the appropriate limits on the scope of criminal background checks.

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<sup>7</sup> Reentry Policy Council, *Charting the Safe & Successful Return of Prisoners to the Community* (2004), at page 299.

<sup>8</sup> American Bar Association, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (August 2004), Recommendations at page 2 (adopted by the House of Delegates on August 4, 2004).

<sup>9</sup> Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2004*, Table 7.

<sup>10</sup> Robert J. Sampson, John H. Laub, “Crime in the Making” (Harvard University Press: 1993).

**1. Substantive Worker Protections Defining the Scope of Employment Prohibitions Based on Criminal Records.** Federal laws require or authorize FBI criminal background checks covering millions of workers employed in both the public and private sectors. In addition to screening for criminal records, these federal laws often prohibit individuals with certain criminal records from being employed in various industries and occupations or they allow the states to do so based on information provided by the FBI's national records system.

For example, federal employment prohibitions enacted since the September 11<sup>th</sup> attacks now apply to workers with criminal records employed in the nearly the entire transportation industry (including aviation, port and ground transportation workers),<sup>11</sup> as well as private security officers.<sup>12</sup> In the past decade, Congress has also enacted laws regulating nursing home and home health care workers,<sup>13</sup> and workers who have "responsibility for the safety and well-being of children, the elderly, or individuals with disabilities."<sup>14</sup> Moreover, the Attorney General is authorized to make the FBI's national criminal records available to the states, covering most categories of workers who are disqualified due to a criminal history pursuant a state's employment and licensing laws.<sup>15</sup>

These federal and state laws are developed by diverse legislative committees and government agencies without the benefit of any uniform federal standards or guidelines. As a result, policies prohibiting employment based on a criminal record tend to evolve piecemeal without federal benchmarks to evaluate the comparative risks and benefits of subjecting new categories of workers to background checks. In addition, there are often no specific safeguards that, for example, take into account the relevancy of disqualifying offenses and protections for current workers who may have an isolated record but a history of loyal service to their employer.

For example, in May of this year, proposed regulations were issued by the Centers for Medicare and Medicaid Programs requiring criminal background checks of all those employed in federally-subsidized programs that provide hospice care, an estimated 20,000 workers not now screened by state laws.<sup>16</sup> While applying to new workers who provide "hands-on" patient contact, including maintenance and administrative workers, the federal mandate contains no limits on the offenses that may be considered or other basic employee protections.<sup>17</sup> There is also inconsistent treatment in federal laws, even among related categories of workers. For example, in contrast to the federal protections that apply to port workers and hazmat drivers, airport workers are not entitled to a procedure which allows them to "waive" a disqualifying offense in cases where the worker has clearly been rehabilitated.

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11 USA Patriot Act of 2001, 49 U.S.C. Section 5103a (hazmat drivers); Aviation and Transportation Security Act of 2001, 40 U.S.C. Section 44936 (unescorted access to airport security areas); Maritime Transportation Security Act of 2002 (46 U.S.C. Section 70105) (secured areas of ports).

12 Private Security Officer Employment Authorization Act of 2004, P.L. 108-458, Title VI, Subtitle E, Section 6402.

13 P.L. 105-277, Div. A, Title I, Section 101(b).

14 42 U.S.C. 5119a(a)(1).

15 P.L. 92-544; 28 C.F.R. 50.12.

16 70 Fed.Reg. 30840 (May 27, 2005).

17 In full, the standard provides that: "The hospice must obtain a criminal background check on each hospice employed and contracted employee before employment at the hospice." 70 Fed.Reg. at 30893 (quoting proposed 42 C.F.R. Section 418.114(d)).

**Recommendation:** Accordingly, the Attorney General should recommend that Congress adopt the following substantive employee protections regulating employment disqualifications under federal law based on an individual’s criminal record:

**a. Establish threshold federal standards regulating when to apply new screening requirements and employment prohibitions based on a criminal record, taking into account public safety and security, individual and civil rights.**

As described above, employment screening requirements increasingly impact millions of individuals who have a criminal record, some recently released from prison and others who have been working as productive members of society for many years job. Indeed, in response to a criminal background search, there is a significant chance (40% according to one study) that the employer will deny an applicant with a criminal record a job without regard to the nature of the offense or any other individual factors.<sup>18</sup>

Moreover, many of the occupations and industries now subject to employment prohibitions based on a criminal record also tend to employ entry-level workers. As a result, the new laws are foreclosing employment opportunities to those with criminal records who rely on entry-level work as their first, and often only, employment option. For example, federal laws have mandated or encouraged criminal records checks of large numbers of non-certified school employees, nursing home workers, and private security officers.<sup>19</sup> In addition, an analysis prepared for NELP based on U.S. Census data found that these and other entry-level occupations most “at risk” of being subject to screening laws and employment prohibitions are the same jobs that traditionally employ disproportionately more people of color.<sup>20</sup>

Before exposing these and other workers to more significant screening requirements, clear federal standards should be established that regulate the expansion of criminal background checks and take into account their impact on employment opportunities for current workers who may have a criminal record, new hires seeking work in entry-level occupations, and people of color. Accordingly, we urge the Department to adopt a balancing test that would consistently apply to proposed screening rules adopted by Congress and federal agencies. Similar to the ABA

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<sup>18</sup> According to this survey of Los Angeles employers, over 40% indicated they that they would “probably not” or “definitely not” be willing to hire an applicant with a criminal record, compared with 20% who indicated they would consider doing so and 35% who indicated it would depend on the applicant’s crime. Harry Holzer, Steven Raphael, Michael Stoll, “Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles,” (March 2003), at page 7.

<sup>19</sup> Under the National Child Protection Act, states are authorized to conduct FBI criminal records checks of most school employees, not just caregivers. According to the federal guidance, “school cooks and janitors fall within the definition of ‘provider’-and, therefore, are amendable to backgrounding – even though they have no direct responsibility for the care of children. They fall within the parameters of the VCA because their employer (the school) is a qualified entity.” CJIS Information Letter (dated December 1, 1999), at Questions 6. Similarly, the recent legislation authorizing a 10-state pilot program of background checks for nursing home and home health workers extends to all “direct patient *access* employees,” which expands the federal law that now applies to “direct patient *care*” employees. P.L. 108-173, Section 307(b)(2)(A)(1)(i); P.L. 105-277, Title I, Section 124. Thus, the pilot program covers support staff, including housekeepers, who have access to patients. Questions & Answers on the Invitation to Apply for “Program for Background Checks of Employees with Direct Access to Individuals Who Require Long Term Care, Sponsored by the Centers for Medicare & Medicaid Services” (August 2004), Question C7.

<sup>20</sup> University of California, Center for Labor Research and Education, *Security Screening and Entry Level Work* (2004).

recommendation, the standard should “limit situations in which a convicted person may be disqualified from otherwise available benefits, including employment, to the greatest extent consistent with public safety.”<sup>21</sup>

**b. Absent special circumstances, new employment prohibitions based on an individual’s criminal records should only apply prospectively, not to current workers.**

Current workers, their employers, customers and clients suffer severe hardships when new employment screening laws apply retroactively. Especially when new employment prohibitions apply to industries that are experiencing serious labor shortages, like trucking and nursing homes, employers are penalized as well when they have no choice but to fire experienced employees based on a disqualifying offense imposed by law.

These policies are entirely inconsistent with experience and research documenting that those workers with a history of employment are also far less likely to commit a crime. Indeed, a major study of former offenders concluded that “for the majority of men, job stability is central in explaining adult desistance from crime.”<sup>22</sup> The study also found that for “all crimes types, job stability has a significant negative effect on the hazard rate,” that is the likelihood of re-arrest.<sup>23</sup> However, while many federal laws apply prospectively to new hires, some of the more recent statutes, including the laws that apply to private security officers and transportation workers, extend broadly to all current workers without regard to their years of service or loyalty to the job.

Accordingly, we urge the Attorney General to recommend a review of existing federal laws and regulations that apply to current workers to evaluate their reliability and effectiveness in identifying actual security and safety risks. In addition, federal standards regulating future laws and agency regulations should be adopted to strictly limit criminal background checks as applied to current workers.

**c. Disqualifying offenses should be time limited, and lifetime disqualifications should be eliminated except in special circumstances.**

Another troubling feature of many federal and state employment screening laws is the absence of reasonable limits on the age of the offenses that disqualify a worker from employment. The absence of reasonable time limits on disqualifying offenses significantly undermines the compelling public safety goal of encouraging rehabilitation through work. These policies are also inconsistent with all the evidence indicating that those who have steered clear of the criminal justice system for extended periods of time are far less likely to commit another crime.

The 2004 law regulating private security officers illustrates where federal policy failed to impose reasonable age limits on criminal history information. According to NELP’s analysis, <sup>24</sup> states preclude anyone with a felony from being employed as a private security guard no matter

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<sup>21</sup> American Bar Association, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (August 2004), Recommendations at page 2 (adopted by the House of Delegates on August 4, 2004).

<sup>22</sup> *Crime in the Making* (1993), at page 162.

<sup>23</sup> *Id.* at page 176.

the age of the disqualifying offense (out of 36 states that have state law standards).<sup>24</sup> The new federal law which authorizes these states to also access the FBI's national criminal records does nothing to limit these lifetime disqualifications as applied to private security officers. Indeed, for those states that do not have their own standards regulating private security officers, the federal law also requires them to provide the employer the results of the FBI records check indicating any felony conviction no matter the age of the offense.<sup>25</sup>

Employment prohibitions that fail to place strict limits on the age of criminal history information are not supported by the research, which documents the declining likelihood of re-arrest over time. Indeed, a leading expert found that those individuals who remained crime-free for 10 years after their conviction are *no more likely* than the average person with no record to commit another offense.<sup>26</sup> The latest research, to be presented in September by respected researchers from the University of South Carolina and the University of Maryland, found even stronger evidence which supports strict age limits on disqualifying offenses. <sup>27</sup> Based on data tracking a cohort of offenders from the Philadelphia area, their study found that by the time a person who was arrested at age 18 reaches age 24 without committing any more crimes, he is statistically no more likely than someone with no prior record to commit a crime.

Accordingly, the Attorney General should recommend that Congress adopt the model of the Maritime Transportation Security Act of 2002 and other federal laws that impose reasonable time limits on disqualifying offenses. For example, the MTSA limits the age of most disqualifying offenses to 7 years since the conviction or 5 years from release, whichever event occurred more recently. (46 U.S.C. Section 70105(c)). These standards should apply not only to specific screening requirements mandated by federal law, but also to those situations where the states or private employers are authorized by federal law to receive the FBI national criminal records for employment and licensing purposes.

**d. All workers with disqualifying offenses should be provided an opportunity to establish that they have been rehabilitated and do not pose a safety or security threat.**

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<sup>24</sup> PowerPoint Presentation by Maurice Emsellem, National Employment Law Project, Congressional Briefing, "Smart on Crime' Agenda to Promote Public Safety While Addressing Occupational Barriers to Employment," (June 9, 2005).

<sup>25</sup> Specifically, the statute requires the state to notify authorized employers if the employee has been "convicted of a felony, an offense involving dishonesty or false statement if the conviction occurred within the previous 10 years, or an offense involving the use or attempted use of physical force against the person of another if the conviction occurred during the previous 10 years. . . ." P.L. 108-458, Section 6402((d)(1)(D)(ii)(I)(aa).

<sup>26</sup> Declaration of Jeffrey Fagan, Ph.D., in the case of *Earl Nixon v. The Commonwealth of Pennsylvania*, in the Commonwealth of Pennsylvania (No. C.D. 2000), at page 5. The affidavit, analyzing longitudinal data from Essex County, New Jersey, also concluded that: "These data dramatically demonstrate that the greater the number of years have passed since criminal activity, the lower the likelihood of subsequent activity." The Pennsylvania Supreme Court invalidated a state law imposing lifetime disqualifications on nursing home workers as applied to those who were employed less than one year. The Court invalidated the law, concluding that the one-year cut-off was irrational under state law, while two concurring Justices concluded that the lifetime disqualification was also unconstitutional. *Nixon v. Commonwealth of Pennsylvania*, 576 Pa. 385 (December 2003).

<sup>27</sup> Power Point Presentation, "Criminal Records and the Risk of Future Criminal Behavior," Study Collaborators Robert Brame (University of South Carolina), Megan Kurylchek (University of South Carolina), Shawn Bushway (University of Maryland).

All workers who have a criminal record should be provided an opportunity as part of the employment screening or licensing process to make their case that they have paid their debt to society and no longer pose a realistic threat to safety or security. This is especially true of individuals who have been convicted of isolated disqualifying crimes that have since steered clear of the criminal justice system and of those workers with a history of alcohol or drug abuse who successfully completed treatment programs.

Waiver protections exist in several state employment and licensing laws, thus providing an opportunity for individuals to challenge a disqualifying offense. For example, in California, most “community care” programs serving seniors, adults and children are subject to a criminal background check that identifies all misdemeanor and felony offenses. However, individual “exemptions” are granted by the Community Care Licensing Division taking into account non-violent offenses, the age of the crime and other mitigating factors.<sup>28</sup> Similarly, the Illinois Health Care Worker Background Check Act provides for a “waiver” from disqualification based on the age and seriousness of the offense, work history and other “mitigating circumstances” indicating that the individual “does not pose a threat to the health of safety or residents, patients, or clients.” (225 ILCS 46/40).

A leading example under federal law is the maritime security law, which established a “waiver” standard for port workers being screened as a “terrorism security risk.” (46 U.S.C. Section 70105(c)(2)). The MTSA waiver standard was also adopted by the TSA in the regulations now being implemented as part of the USA Patriot Act to screen more than two million commercial drivers who are authorized by the states to transport hazardous material. (49 U.S.C. 5103a; 49 C.F.R. Section 1572.7).<sup>29</sup> The MTSA waiver standard should be adopted by the Attorney General as a model for Congress to apply to all current and future federal laws that disqualify workers from selected occupations based on their criminal record.

**e. Disqualifying offenses imposed by federal law should “directly relate” to the responsibilities of the occupation and be more closely scrutinized to limit broad categories of offenses and less serious crimes.**

A fair and effective federal policy requires that special scrutiny apply to the major offenses that result in disqualification from employment or licensing, requiring that they “directly relate” to the responsibilities of the job. This necessary standard is consistent with the employment protections adopted by the EEOC as applied to criminal records and with the employment and licensing laws in place in half the states.<sup>30</sup>

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<sup>28</sup> California Department of Social Services, Caregiver Background Check Bureau, *Evaluator Manual: Background Check Procedures* (04RM-01) (January 2004). See Sections 7-1700 to 7-1736, describing the waiver process and the levels of exemptions based on the seriousness of the offense (including “simplified,” “standard,” and “non-exempt” offenses).

<sup>29</sup> As the preamble to the hazmat regulations state: “Waivers are being offered because an applicant may be rehabilitated to the point that he or she can be trusted in sensitive or potentially dangerous work or has been declared mentally competent.” 69 Fed.Reg. at 68738.

<sup>30</sup> EEOC Guidance No. N-915-061(September 7, 1990); Margaret Colgate Love, “Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide,” (July 2005), at page 9. The report documents that more than half the states have similar language prohibiting a refusal to hire and/or issue a professional or occupational license unless the offense is “directly related” (or “substantially related” or “rationally related”) to the

Absent these protections, thousands of individuals, including record numbers of people now being released from prison for non-violent crimes, will continue to be denied an opportunity to contribute to society. In addition, workers applying for the same jobs with the same criminal record will receive dissimilar treatment, which undermines the integrity of the screening system.

As the Criminal Justice Information Services states in its guidance interpreting the broad language of the National Child Protection Act (amended by the Volunteers for Children Act, or VCA): “A persuasive argument in favor of formalizing the criteria to be applied by the ‘authorized agency’ in rendering its fitness determination is the concern regarding equitable treatment. The broad breadth of the VCA raises the likelihood that those with similar backgrounds – for example, two teacher applicants with five-year-old convictions for petty larceny – will receive dissimilar treatment by two different clerks in the authorize agency who must apply the VCA in the absence of specific disqualifying criteria.” 31

Evaluating the proper scope of disqualifying offenses requires a close look at the profile of the population now leaving prison and entering the labor market. Over 650,000 people were released from prison in 2003 alone, which is an increase of more than 50,000 in just three years.<sup>32</sup> Three out of four individuals being released from prison have served time for non-violent offenses. 40% of the non-violent offenders expected to be released in the next six months committed property offenses. And 37% committed drug offenses, including the 17.5% being released for drug possession specifically.<sup>33</sup>

Also of special significance, 48% of non-violent offenders being released from prison are African-American and 25% are of Hispanic origin. As a recent state study found, “Among those arrested on drug charges, African Americans are five times more likely to be sentenced to prison terms of a year or more than Whites arrested on drug charges.”<sup>34</sup> Nationally, African Americans men and women are five to six times more likely than Whites to be incarcerated during their lifetimes.<sup>35</sup>

Disqualifying Drug Offenses: Given the vast numbers of people leaving prison with non-violent drug convictions, and the resultant impact of these disqualifying drug offenses on the employment opportunities of people of color, it is especially important to closely scrutinize disqualifying drug offenses in federal screening laws.

While time-limited drug offenses are appropriate disqualifications for those employed in medical and other settings involving exposure to controlled substances, they are far less relevant

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occupation.

31 CJIS Information Letter, dated December 1, 1999, Question 11.

32 Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2004* (April 2005), Table 7.

33 Bureau of Justice, “Profile of Nonviolent Offenders Exiting State Prisons” (October 2004).

34 Thomas P. Eichler, *Race and Incarceration in Delaware: A Preliminary Consideration* (Delaware Center for Justice and Metropolitan Wilmington Urban League: 2005), at page 5.

35 African-American men are six times more likely that White men to go to prison during their lifetime (32.2% versus 5.9%). American-American women are more than five times more likely that White women to go to prison during their lifetime (5.6% versus 0.9%) Bureau of Justice Statistics, *Prevalence of Imprisonment in the U.S., 1974-2001* (August 2003), at page 1.

as applied to jobs in security, transportation and other major industries. For example, the TSA correctly removed felony drug possession from its list of disqualifying offenses that apply to commercial drivers seeking a hazmat endorsement, concluding that “[s]imple drug possession generally does not involve violence against others or reveal a pattern of deception, as crimes like smuggling or bribery often do.”<sup>36</sup> However, TSA went too far in disqualifying all those convicted of other felony drug offenses from maintaining a livelihood in trucking, which is a major occupation that has previously been available to people with criminal records.<sup>37</sup>

Expansive Categories of Offences: In addition, the Attorney General should adopt standards that disfavor disqualifying misdemeanors and refrain from grouping broad categories of offenses that make it difficult to distinguish between serious and less serious criminal conduct. For example, Congress wisely decided to limit the MTSA’s disqualifications to felonies as applied to the security threat assessments of port workers. In contrast, the federal screening law that applies to aviation workers and airport screeners includes unlawful possession of a weapon as a disqualifying offense, which has been broadly interpreted to cover any misdemeanor weapons possession offense, including possession of brass knuckles and mace.<sup>38</sup> Other especially broad categories of disqualifying offenses in federal laws, such as “dishonesty, fraud, or misrepresentation,” should also be strongly disfavored.<sup>39</sup>

Blanket Felony Disqualifications: Recognizing the increasing numbers of people leaving prison for non-violent offenses, the federal laws should also prevent blanket policies that penalize all those with a felony conviction. For example, the new federal law regulating private security guards authorizes the states to provide employers with the entire felony record generated by the FBI, which will inevitably produce adverse employment decisions based on crimes like welfare fraud, marijuana possession,<sup>40</sup> and other lesser felonies that should not be sanctioned by federal policy.

## **2. Procedural Protections Ensuring More Complete Criminal Records & Privacy Rights.**

Congress also directed the Attorney General to make recommendations related to several specific

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<sup>36</sup> 69 Fed.Reg. 68720, 68723 (November 24, 2004).

<sup>37</sup> As a *New York Times* editorial recently concluded, “Requiring drivers to have background checks before receiving hazardous material certifications makes perfect sense. But the law, as interpreted by the Transportation Security Administration, singles out law-abiding ex-offenders whose criminal records have nothing to do with terrorism or national security.” “Barred from the Long Haul,” *New York Times* (June 6, 2005).

<sup>38</sup> Interpreting the federal law, the TSA concludes that the disqualification for a felony or misdemeanor weapons offenses covers all of the following: “In addition to firearms, knives, and explosives, the term weapon encompasses other items, including asp, nunchakus, brass knuckles, kubatons, throwing stars, stun gun, black jacks, and mace.” U.S. Department of Homeland Security, Office of Chief Counsel, Transportation Security Administration, Legal Guidance on Criminal History Records Checks (May 28, 2004), at page 4, note 7.; see also *United States of America v. Rick Joe Baier*, 324 F.3d 282 (4<sup>th</sup> Cir. 2003).

<sup>39</sup> 49 C.F.R. Section 1572.103(b)(6) (hazmat endorsements); P.L. 108-458, Section 6402(d)(1)(D)(ii)(I)(aa) (private security officers).

<sup>40</sup> According to a survey of state laws, possession of marijuana in an amount of 8 ounces or more rises to the level of a felony in a number of states, including the large population states of Florida (20 grams, or less than one ounce), Illinois (30 grams, or slightly more than one ounce), and New York (8 ounces). National Organization for the Reform of Marijuana Laws, *State Guide to Marijuana Penalties* (2001) ([http://www.norml.org/index.cfm?Group\\_ID=4916](http://www.norml.org/index.cfm?Group_ID=4916)). Based on federal figures, an estimated 11,000 individuals were convicted of felony possession of marijuana in state courts in 1994, compared to 870,000 total felony convictions. Marijuana Policy Project, *Marijuana Arrests and Incarceration in the United States: Preliminary Report* (November 1998), at page 3.

procedural protections to ensure that criminal records are complete and accurate, while also safeguarding the individual's privacy.<sup>41</sup> (Sections 6403(d)(5), (8)).

By way of background, it is important to identify some of the key strengths and limitations of the federal criminal records system as applied to employment and licensing. In contrast to the state record systems and most of the private firms that conduct criminal record searches, the FBI's system makes it possible to search the records in most states. In addition, the FBI's system reduces the likelihood of misidentification when fingerprint records are available as required by federal law when searches are conducted for employment and licensing purposes.

However, the increased reliance on the FBI's national system for employment and licensing purposes also poses serious concerns. First, the quality of the FBI's system is dependent on the significant limits of state records. For example, in more than half of the states, 40% of the arrests in the past five years have no final disposition recorded, which means that the FBI's system is similarly incomplete.<sup>42</sup> Indeed, the federal records for each state are often *more* incomplete than the state criminal records database due to the inability of the FBI to access all available state records and the delays inherent in reporting dropped charges and other dispositions to the FBI.

In addition, the FBI system of fingerprint searches can produce serious processing delays. When fingerprints are collected for non-criminal justice purposes, they are often rejected by the FBI because of the impaired quality of the fingerprints collected by private firms and other non-criminal justice agencies. Indeed, fingerprints are rejected by the FBI 68% more often in the case of record requests submitted for civil purposes versus those submitted for criminal purposes.<sup>43</sup> In 2004 alone, 536,000 civil fingerprint submissions were rejected as inadequate by the FBI (or 6% of the total). As a result, the screening process is delayed and the worker's employment status is left pending while new fingerprints are submitted to the state, then screened again by the FBI.

**Recommendation:** We urge the Department to adopt the following recommendations to strengthen procedural protections ensuring that individual records are current and reliable and that their privacy is adequately protected.

**a. Create safeguards protecting against adverse employment decisions and discrimination based on incomplete criminal records, including a one-year limit on arrests with no dispositions.**

Stronger federal standards should be established protecting individuals with incomplete criminal records without prejudicing their employment or licensing opportunities. Records indicating an arrest without a disposition are especially problematic given the routine failure of the state systems to update their records and the burden imposed on the individual to negotiate

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<sup>41</sup> Section 6403(d)(5) calls for recommendations related to "Privacy rights and other employee protections, including – (A) Employee consent; (B) Access to records if employment was denied; (C) The disposition of the fingerprint submissions after the records are searched; (D) An appeal mechanism; and (E) Penalties for misuse of the information." In this section, we also address "Which requirements should apply to the handling of incomplete records," as set forth in Section 6403(d)(8).

<sup>42</sup> Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2001* (August 2003), at page 2.

<sup>43</sup> Steve Fischer, FBI, Criminal Justice Information Services Division, Office of Multimedia, Response to Information Request from Maurice Emsellem, National Employment Law Project (dated July 22, 2005).

corrections with the state courts, including dismissals and even acquittals.

An arrest alone is, by definition, an accusation, which will often be more serious than necessary to provide prosecutorial flexibility. For those individuals with the resources and abilities to do so, it can often take more than a year to collect the information necessary to document that a charge was dismissed or resulted in acquittal. Even criminal records that are sealed by a state may not show up until much later in the FBI criminal records system. As a result of these and other concerns related to the use of arrest records, 10 states prohibit *all* employers and licensing agencies from considering arrests if the arrest did not lead to conviction and another three states do so in case of specific employment and licensing decisions.<sup>44</sup>

Federal laws can aggravate the problem of disqualifications based on arrests and other incomplete criminal history information. For example, according to TSA, even arrests falling outside the 10-year age limit on disqualifying offenses for workers with unescorted access to an airport must be investigated to determine the disposition of the case.<sup>45</sup> In addition, TSA's regulations impose an unreasonably strict time limit on hazmat drivers who cannot produce "written proof that the arrest did not result in a disqualifying offense within 45 days" after service to the individual of the agency's notification.<sup>46</sup>

The Attorney General should adopt appropriate age limits on the use of outstanding arrest records and other safeguards that take into account the difficult realities of correcting criminal records. For example, the new federal law regulating private security officers limits the information provided to employers to convictions and felony charges that have been pending no longer than 365 days.<sup>47</sup> This is consistent with the FBI's regulations defining "nonconviction data" to include dismissals, acquittals and arrests with no disposition that have been pending longer than one year.<sup>48</sup> Absent these and other protections, workers are effectively denied employment based on their arrest records which raises fundamental fairness and civil rights concerns.

- b. Federal procedural protections should be significantly strengthened by making the FBI's information available to all those who produce a criminal record while also clarifying that the opportunity to correct the individual's record should be available before an adverse employment determination is made by any authorized agency or employer.**

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<sup>44</sup> Legal Action Center, *After Prison: Roadblocks to Reentry, A Report on State Legal Barriers Facing People with Criminal Records* (2004), at page 10.

<sup>45</sup> U.S. Department of Homeland Security, Office of Chief Counsel, Transportation Security Administration, Legal Guidance on Criminal History Records Checks (May 28, 2004), at page 4.

<sup>46</sup> 49 C.F.R. Section 1572.103(d).

<sup>47</sup> Section 6402(d)(1)(D)(ii). ("if the individual has been "charged with a felony for which there has been no resolution during the preceding 365 days . . .").

<sup>48</sup> 28 C.F.R. Section 20.3(q). ("Nonconviction data means arrest information without disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charges is pending; information disclosing that the police have elected not to refer a matter to a prosecutor, that a prosecutor has elected not to commence criminal proceedings, or that proceedings have been indefinitely postponed; and information that there has been an acquittal or a dismissal.") .

Several key procedural protections apply to the use of the national fingerprint-based criminal records system.<sup>49</sup> Of special significance, an agency authorized to submit the fingerprints to the FBI must provide notice to the worker and an opportunity to challenge the accuracy of the FBI's records within a reasonable time *before* a determination is made authorizing the individual's employment.<sup>50</sup> In addition to these "use-and-challenge" requirements, specific procedures exist to access the FBI's "identification record" (which includes an \$18 fee) and request corrections (which are forwarded by the FBI to the originating state).<sup>51</sup>

**Recommendations:** In addition to these minimum procedural protections, we urge the Attorney General and Congress to adopt the following necessary improvements which are consistent with the requirements of the Fair Credit Reporting Act (FCRA):

**1. Make the FBI's criminal record available to all those individuals who produce a criminal record and eliminate the duplicative processing fees.** The current procedure for correcting an individual's record should be streamlined by automatically providing the information in those cases where the individual produced a criminal record as part of an FBI criminal records search. This should take place in all cases, not just where the employer concedes that the employment was denied based on the individual's criminal record.

This proposal expands on the protections of the FCRA, which requires that before taking adverse action against a current employee or job applicant based on information in the individual's credit report, the employer must give that individual a copy of the report and a written description of his or her FCRA rights.<sup>52</sup> In addition, we urge that the \$18 fee and request for additional fingerprints be eliminated in these situations, thus avoiding the duplicative practice of also requiring a fee and fingerprints as part of the original records request submitted to the FBI.

These reforms will go a long way to reduce the prejudicial delays that occur in seeking to correct incomplete criminal records information, while also making the information more readily available to those most at risk of being denied employment as a result of their criminal record.

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<sup>49</sup> Pub. L. 92-544; 28 C.F.R. Sections 16.34, 20.33, 50.12.

<sup>50</sup> In pertinent part, the federal regulations provide: "Officials at the governmental institutions and other entities authorized to submit fingerprints and receive FBI identification records under this authority must notify the individuals fingerprinted that the fingerprints will be used to check the criminal history records of the FBI. The officials making the determination of suitability for licensing or employment shall provide the applicants the opportunity to complete, or challenge the accuracy of, the information contained in the FBI identification record. . . . *Officials making such determinations should not deny the license or employment based on information in the record until the applicant has been afforded a reasonable time to correct or complete the record, or has declined to do so.* A statement incorporating these use-and challenge requirements will be placed on all records disseminated under this program. This policy is intended to ensure that all relevant criminal record information is made available to provide for the public safety and, further, to protect the interests of the prospective employee/licensee who may be affected by the information or lack of information in an identification record." 28 C.F.R. Section 50.12(b) (Emphasis added).

<sup>51</sup> 28 C.F.R. Sections 16.30-16.34.

<sup>52</sup> 15 U.S.C. Section 1681b(b)(3)(A) ("in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates – (i) a copy of the report; and (ii) a description in writing of the rights of the consumer under this title, as prescribed by the Federal Trade Commission under section 609(c)(3)."). Enforcing this provision, the FTC recently settled a major case against a Las Vegas casino, resulting in \$325,000 in civil penalties. Press Release, Federal Trade Commission, "Job Applicants Not Informed of their Rights Under Fair Credit Reporting Act, FTC Alleges,"

**2. Ensure that the use-and-challenge protections apply to all employers and agency officials.** Private employers and all federal and state entities authorized to make suitability determinations under federal laws should comply with the federal “use-and-challenge” requirements. Especially important, they should be obligated to allow the individual to correct the record *before* the employer makes an adverse suitability determination. However, while some federal laws expressly incorporate these “use-and-challenge” protections, others do not thus leaving unnecessary room for ambiguity.<sup>53</sup>

For example, the Office of Inspector General (OIG) cited TSA’s failure to provide airports screeners with an adequate opportunity to explain their records as a major flaw in TSA’s program adopted after September 11th.<sup>54</sup> The OIG report concludes that the TSA’s failure to provide an opportunity to comment on the information before the agency issued an adverse determination contributed to the 42% reversal rate when screeners were later allowed an opportunity to challenge the decision. According to the Department of Transportation’s manual setting forth the personnel security policies that TSA was obligated to follow, “This practice . . . prevents errors which might otherwise result from mistakes in identity or erroneous information and provides the applicant or employee the opportunity to present mitigating information that may be unknown to the adjudicating officials.”<sup>55</sup>

Thus, we urge the Department to recommend a change in law clarifying that the “use-and-challenge” protections apply to all entities, including federal officials, state officials and private employers, authorized to receive FBI criminal history information in order to make a determination of the individual’s suitability for employment.

**c. Consistent with current practice, fingerprints collected for employment and licensing purposes should be destroyed and not retained by the FBI.**

Section 6403(d)(5)© also directs the Attorney General to make recommendations related to the “disposition of the fingerprint submissions after the records are searched.” Under current policy, fingerprint submissions are destroyed once the results of the FBI’s criminal records search have been forwarded to the authorized agency or entity. To the extent that Congress is soliciting proposals to revisit this settled practice and retain fingerprints submitted for employment and licensing purposes, we urge the Attorney General to reject this invitation.

Those advocating to retain fingerprints submissions promote a “hit notification” system, where the fingerprints of all covered employees remain on file for immediate detection if the individual is at any point arrested for a crime.<sup>56</sup> For example, Florida implemented this policy last year as

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<sup>53</sup> For example, in contrast to the Private Security Officer Employment Authorization Act of 2004 (P.L. 108-458, Title VI, Subtitle E, Section 6402(d)(1)(B)) and other federal laws, the National Child Protection Act of 1993 specifically incorporates most of the “use-and-challenge” protections set forth in federal regulations. 42 U.S.C. 5119a(b).

<sup>54</sup> Office of Inspector General, Department of Homeland Security, *A Review of Background Checks for Federal Passenger and Baggage Screeners at Airports* (January 2004), at page 25.

<sup>55</sup> *Id.*

<sup>56</sup> Testimony of Donna Uzzell, Florida Department of Law Enforcement, U.S. House of Representatives, Committee on Education & the Workforce (September 28, 2004), at page 5.

applied to all school personnel who have “direct contact” with students.<sup>57</sup> According to Florida’s law, “such fingerprints shall thereafter be available for all purposes and uses authorized for arrest fingerprint cards entered in the statewide automated fingerprint identification system.” Under Florida’s law, anyone convicted of a “crime of moral turpitude” is disqualified from employment in the state’s school system.

This policy, if adopted or endorsed nationally, would seriously undermine the privacy of millions of workers employed after submitting their fingerprints for criminal records searches. The threat to privacy based on monitoring all arrests of all employees who submitted to fingerprinting far outweighs the limited benefit of identifying a pending charge that most often will not be relevant to the individual’s job performance. Moreover, the policy significantly increases the risk that workers will be unfairly suspended or even fired based only on an extraneous charge not leading to conviction. Finally, current procedures, which typically require workers to report recent arrests to their employers or submit to periodic criminal records searches, are sufficient to monitor the conduct of those employees who, by definition, have already cleared a full criminal records check.

### **B. Strictly Limit the Scope of Private Employer Access to Federal Criminal Record Information**

The Attorney General must also make recommendations to Congress related to private employers and their access to federal criminal record information. Specifically, the law calls for recommendations related to the “scope and means of processing background checks for private employers utilizing data maintained by the Federal Bureau of Investigation that the Attorney General should be allowed to authorize in cases where the authority for such checks is not available at the State level.” (Section 6403(d)(6)). Similarly, the Attorney General is directed to address the “circumstances under which criminal history information should be disseminated to the employer” and the “type of restrictions that should be prescribed for the handling of criminal history information by an employer.” (Sections 6403(d)(9), (10)).

**Recommendation:** For the reasons described below, we urge the Attorney General to recommend that Congress limit, not expand, the authority of private employers to request and review national records absent state laws. Private employers should not be authorized to request FBI criminal history information, and their role should be limited to receiving the standard results of a “fitness determination” from the appropriate agency that reviews the FBI criminal records pursuant to state or federal employment and licensing standards. Finally, we urge Congress to adopt the model of the MTSA which states that the individual’s criminal history information “may not be made available to the public, including the individual’s employer.” (46 U.S.C. Section 70105(3)).

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<sup>57</sup> Fla. Stat. Section 1012.32. Another example includes California’s law, which authorizes state agencies that process applications for employment and licensing purposes to apply for “notification of subsequent arrest.” Cal. Penal Code Section 11105.2(a). New York’s Department of Education also maintains a “Search and Retain” policy, which retains the fingerprints of school employees for comparison with arrest records until the individual is no longer employed in the schools for more than 12 months.

- **Current federal law limits the ability of private employers to request FBI records and generally requires that authorized agencies, not employers, make the “fitness determinations” based on the individual’s criminal record.**

Current federal law limits the authority of private employers to request an individual’s FBI criminal records absent a right to do so under state law. Thus, except in special cases created by federal law, the FBI can only exchange information with “authorized officials,” which mostly includes federal and state agencies that conduct criminal background checks for employment and licensing purposes. (28 U.S.C. Section 534(a)(4)). The major exceptions created by Congress apply to qualified employers of private security officers, home care and health care workers, and those who employ workers caring for children, the elderly and disabled.

While these private employers are authorized to request an individual’s FBI records, the request must still be processed by an authorized state agency or another independent authority.<sup>58</sup> Moreover, in the case of those employed in occupations involving contact with children, the elderly and the disabled covered by the National Child Protection Act, federal law also requires the authorized agency, not the employer, to review the FBI records and make the determination of the applicant’s fitness according to state standards.<sup>59</sup> The private employer is informed only as to the final fitness determination by the state or the presence of a disqualifying crime, not the full content of the individual’s national criminal record.

Thus, the National Child Protection Act “carefully distinguishes between the responsibilities of the qualified entity [i.e., the employer] and the authorized entity [i.e., the government agency]. It is the latter’s responsibility to review criminal records history, obtain dispositions, render fitness determinations, and communicate these determinations to private qualified entities. There are no provisions for, nor is there an authorized purpose for, transmitting the criminal history record information to a nongovernmental qualified entity.”<sup>60</sup>

- **Expanding the authority of private employers to request and review FBI criminal records creates a significant potential for error and abuse by employers which will unfairly penalize the nation’s workers.**

The states that have chosen to authorize FBI criminal records according to their employment and licensing policies typically establish standards to ensure that the information used to make a fitness determination is relevant, reliable and confidential. If private employers are allowed to

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<sup>58</sup> For example, the National Center for Missing and Exploited Children was recently designated by Congress as an agency authorized to make fitness determinations related to providers and volunteers who care for children. [cite]

<sup>59</sup> For example, New York regulations, which took effect in April 2004, authorize nursing home and home health care employers to request FBI criminal history information, to receive the entire record, and to make the fitness determination. While the regulations identify several specific disqualifying offenses, they also authorize the employer to disqualify a worker when the “criminal history record check reveals a conviction for any other criminal offense . . . , other than a traffic violation” provided the employer also complies with the broad provisions of the state’s anti-discrimination provisions. 10 NYCRR Section 400.23(g)(I)(ii). Given the scope of this authority, the Legal Action Center and other advocates in New York representing individuals with records report that employers are making substantial errors interpreting the records which penalize those who apply for positions as nursing home and home care workers.

<sup>60</sup> CJIS Information Letter, dated December 1, 1999, Question 9 (parentheticals provided).

bypass the states, there is significant potential for error and abuse by employers that will unfairly penalize the nation's workers.

We are especially concerned that private employers are not qualified to evaluate an FBI criminal record given the level of technical information and often incomplete criminal histories generated from any number of states, not just the employer's state. Moreover, the FBI's criminal record includes the entire criminal history, which the agency does not edit or otherwise sanitize before it is released. Given the lack of required skill and resources necessary to evaluate an FBI record, private employers who are provided the information are likely to make significant factual mistakes or, more likely, choose to err in favor of denying employment based on literally any evidence of a criminal record. Not surprisingly, at least 40% of employers would "probably" or "definitely" not hire an individual who they are aware possesses any criminal record.<sup>61</sup>

We are also deeply concerned that private employers will abuse their authority to request and review FBI criminal records in a manner that undermines established employee rights, including the right to organize collectively. Indeed, it is not uncommon for private employers to retaliate against workers who exercise their rights to organize by attempting to discredit them with a criminal record.<sup>62</sup> Other employers have also abused the right to request criminal records by exposing large numbers of workers to privacy intrusions when provided the opportunity under state law. For example, without substantial justification, Wal-Mart recently took advantage of a narrow California law regulating over-the-counter medications to fingerprint and have state criminal background checks conducted on 1,000 workers employed by a major Wal-Mart distribution center.<sup>63</sup>

For the reasons described above, we urge the Attorney General to recommend that Congress limit, not expand, the authority of private employers to request national records absent state laws.

### **C. Employers, Not Workers, Should Absorb the Fees Required for the Criminal Records Search**

Congress also required the Attorney General to make recommendations related to "[a]ny restrictions that should be placed on the ability of an employer to charge an employee or prospective employee for the cost associated with the background check." Section 6403(d)(7). In

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<sup>61</sup> Harry Holzer, Steven Raphael, Michael Stoll, "Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles" (March 2003), at page 7.

<sup>62</sup> See, e.g., Consolidated *Biscuit Company and Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, AFL-CIO, CLS*, 2004 NLRB LEXIS 9 (January 14, 2004) ("Given the absence of any credible explanation, I find that this background check was motivated by CBC's hostility towards Teegardin's union activity."); Jacobs *Heating & Air Conditioning and Sheet Metal Workers International Association, Local Union No. 19*, 2001 NLRB 7636 (September 18, 2001) (finding a violation of the National Labor Relations Act because the employer "did its best not to hire Bazeski, Kennan, and Joseph by obtaining criminal background checks . . .").

<sup>63</sup> The California law is intended to screen workers with criminal records who have significant contact with large amounts of over-the-counter cold remedies that could be used in the illegal production of methamphetamine. Based on this law, Wal-Mart decided to fingerprint 1,000 employees of the Red Bluff distribution center and send the records to the state for criminal background checks, claiming "any associate in the building would have the potential to come into contact with any merchandise in our building." In reviewing the case, the California Attorney General's office stated that "most of the other companies lock up the ephedrine products and allow access to limited numbers of individuals." Marc Beachamp, "Workers Fingerprinted," *The Record-Searchlight* (March 26, 2004).

addition, the law refers more generally to the “range of Federal and State fees that might apply to such background check requests.”

**Recommendation:** For the reasons described below, federal law should direct that the employer pay the full costs of the fingerprinting and processing of the criminal records, while also precluding employers from seeking to recoup the fee, either directly or indirectly, from the worker’s compensation.

- **The fees associated with fingerprint-based criminal records searches impose a financial hardship on working families.**

Compared to named-based criminal records searches, the increased costs associated with the FBI’s fingerprint-based system are significant, which largely accounts for why so many state employment and licensing laws still do not require FBI records checks in addition to their state criminal history searches. The FBI charges \$24 for a fingerprint search of the national records system, which does not include the fee required to generate FBI-quality fingerprints. In addition, when an occupation is regulated by the state, an FBI search typically supplements a state criminal records search which also includes various registration or licensing fees.

These fees impose a financial hardship on working families, including the large proportion of low-wage, entry-level workers employed in nursing homes, schools, private security, and other major industries where criminal records checks are becoming far more commonplace. For example, in California, private security officers must pay a number of fees, starting with a state registration fee of \$50, then a California fingerprint-based records search costing \$32, the \$24 FBI fee, and the fee to generate the fingerprints which varies from \$20 to \$35 depending on the county. Thus, not including the \$50 registration, a private security officer pays fees totaling \$76 to \$91 for the fingerprint-based records search. By comparison, most private security officers earn less than \$11 an hour.<sup>64</sup> As a result, the fingerprint-based criminal records fees absorb more than a full day’s pay (before taxes), which is a significant sacrifice for a low-wage working family.<sup>65</sup>

- **The absence of federal laws regulating who pays for the criminal records search often leads to fees being passed on to workers and to inequitable treatment of similarly-situated individuals.**

Despite the significant impact of these fees on workers subjected to fingerprint-based criminal records searches, most federal laws do not designate the party responsible for paying the fees. Because the states are not in position to absorb the costs, pressure has increased to impose the burden on workers. As a result, workers routinely absorb the costs of the criminal records search and similarly-situated workers in different state (and counties, as in the case of school employees) are often treated unequally.

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<sup>64</sup> University of California, Center for Labor Research and Education, *Security Screening and Entry Level Work* (2004).

<sup>65</sup> This example, with federal and state fingerprint-based criminal records searches totaling \$75 to \$100, is not uncommon. For example, in Florida, a law was recently passed requiring both FBI and state criminal records searches of school employees, which will cost \$86 per worker every five years. Jeffrey Solocheck, “School Security Plan May Cost Staff: School Employees and Volunteers Might Have to Pay for Fingerprinting Every Five Years Under a Legislative Mandate,” *St. Petersburg Times* (October 16, 2004).

Where federal law has addressed the allocation of fees, it has generally done so on a limited basis. For example, the federal regulations requiring screening of workers operating in secured areas of airports mandates that the airport operators pay for the fingerprint collection fee.<sup>66</sup> In contrast, the federal law authorizing nursing home and home health care employers to request FBI criminal records addresses the processing fee, but only in discretionary terms stating that the “Attorney General *may* charge a reasonable fee, not to exceed \$50 per request, to any nursing facility or home health care agency requesting a search . . . .”<sup>67</sup> In contrast, New York’s regulations authorizing an FBI criminal records search of nursing home and home health workers specifically precludes employers from “directly or indirectly” passing along the cost of the criminal records search to its employees.<sup>68</sup>

**D. Federal and State Agencies Should Devote Their Limited Resources to Strengthening the Infrastructures to Produce Reliable Criminal History Information, Not Rely on Commercial Providers of Criminal History Data and Screening Services.**

Finally, the Attorney General is required to make recommendations related to the role of commercial firms that provide a range of employment screening services, including fingerprint processing, criminal history background checks, and individual fitness determinations. Specifically, Congress called for recommendations concerning the “effectiveness and efficiency of utilizing commercially available databases as a supplement” to the FBI system. (Section 6403(d)(1)). The services provided by commercial firms also relate to the “infrastructure that may need to be developed to support the processing of such checks, including – (A) the means by which information is collected and submitted in support of the checks; and (B) the system capacity needed to process such checks at the Federal and State level.” (Section 6403(d)(13)).

**Recommendation:** We urge the Department to adopt the following recommendations which strictly limit, not expand, the functions of commercial firms as they relate to employment screening of criminal histories required by federal and state laws:

- a. Commercially-available databases should not be used to supplement the FBI criminal history information because of serious questions related to their accuracy and the industry’s lack of compliance with privacy protections.**

As ChoicePoint and other commercial screening firms collect and report more criminal history information on millions of individuals, fundamental questions are being raised about the accuracy of the criminal history information they provide and their compliance with basic privacy protections. These concerns are shared by the general public, which strongly favors limiting the provision of criminal history information to government agencies. According to a major poll conducted in 2000, 69% of the public “worries” about the participation of commercial firms in providing criminal history information to government agencies for employment and licensing

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<sup>66</sup> 49 C.F.R. Section 1542.209.

<sup>67</sup> P.L. 105-277, Section 124(d) (emphasis added).

<sup>68</sup> The New York regulations state: “No operator shall seek to obtain from a prospective employee, directly or indirectly, compensation in any form for the payment of the fee or any facility costs associated with obtaining the criminal history record check required by this Section.” 10 NYCRR Section 400.23(d)(3).

purposes.<sup>69</sup>

The risk of generating inaccurate and incomplete information is especially significant in the case of commercially-available databases. For example, in contrast to the FBI's fingerprint-based records system, private screening firms rely on names, Social Security numbers and other non-biometric indicators gathered from state and county criminal records. However, according to a study prepared for the Department of Justice, one out of 20 (5.5%) of these name-based checks incorrectly produce a criminal record (or "false positive").<sup>70</sup>

As result, even major corporations generate inaccurate or incomplete information, which is what happened when a commercial screening firm (which was later purchased by ChoicePoint) incorrectly purged more than two thousand individuals from Florida's voting roles after contracting with the state to identify ineligible voters under the state's felony disenfranchisement law.<sup>71</sup> Because of the limited reliability of the information produced by commercial firms, law enforcement officials and civil liberties advocates recently defeated a measure in Arkansas that would have allowed a private provider of criminal history information to compete for the state's criminal background checks.<sup>72</sup>

In addition, private providers often fail to comply with current privacy protections governing criminal records, which raises fundamental questions about their qualifications to participate in the federal program. A recent study reviewed the practices of 50 randomly selected commercial screening firms that generate criminal records to determine whether they complied with the privacy protections of the Fair Credit Reporting Act (FCRA).<sup>73</sup> The survey found that only about half (56%) of the screening firms covered by the FCRA provided information about the federal protections. For example, the FCRA prohibits release of arrest records that date back more than 7 years. (15 U.S.C. Section 1681c(a)(2)). However, 57% of the firms indicated that they could search their records dating back more than 7 years.

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69 The survey of over 1,000 individuals, conducted in 2000 for the Bureau of Justice Statistics, found that 69% agreed most with the statement, "It worries me that this is being done by commercial organizations and I favor this being done by the government." The survey question was prefaced as follows: "Turning from government record systems to the private sector, there are private companies that collect reports of arrests and trial outcomes from newspaper stories and from various public records, such as criminal court files. These companies sell this information to private parties such as private employers, insurance companies investigating fraud, or lawyers checking out parties or witnesses in civil litigation. The companies also provide criminal history reports to government licensing agencies, government employers, and other government agencies. Which ONE of the following judgments about this system of private information suppliers of criminal history records would you agree with MOST?" In addition, 85% of those surveyed felt that commercial companies maintaining and distributing commercial history records should follow the same rules and procedures regarding fair information practices as would bind government criminal history agencies. U.S. Department Justice, Bureau of Justice Statistics, *Privacy, Technology and Criminal Justice Information: Public Attitudes Toward Uses of Criminal History Information* (July 2001).

70 Report of the National Task force to the U.S. Attorney General, *Interstate Identification Index Name Check Efficacy* (July 1999), at page 48.

71 NAACP News, "Settlement Reached in Florida Election Lawsuit" (September 3, 2003).

72 "Background Checks Subject of 2 Bills: State Policy Wouldn't Be Sole Agency Allowed to Perform Inquiries," *Arkansas Democrat-Gazette* (Little Rock) (February 22, 2005); "Background Check Plan Dies in House," *Arkansas Democrat-Gazette* (February 23, 2005).

73 Shauna Briggs, Meridith Thanner, Shawn Bushway, Faye Taxman, Mishelle Van Brakle, "Private Providers of Criminal History Records: Do You Get What You Pay For?" (paper prepared for a forthcoming book, to be published by the Russell Sage Foundation).

Finally, there is no independent agency or governing body that certifies or licenses these employment screening firms according to any national standards. As a result, it is especially difficult for federal agencies to effectively monitor the industry while extending their services to include sensitive government functions.<sup>74</sup> Thus, we urge the Attorney General not to endorse proposals to supplement federal criminal records with commercially-available databases.

**b. The demands to comply with new employment screening mandates requires a strategic investment in the federal and state infrastructure, not new federal authority to outsource sensitive screening functions.**

Along with the unprecedented demands on federal and state agencies to process millions more criminal records requests for employment and licensing purposes, proposals have increased to contract out these sensitive screening functions to private firms.<sup>75</sup> We urge Congress to revisit the FBI's recent policy which authorizes the "outsourcing" of sensitive screening functions and instead devote these resources to building a federal and state infrastructure with the capacity to produce reliable criminal history information for employment purposes.

Federal law allows the FBI to exchange its criminal record information with "authorized officials," which has been mostly limited to federal and state agencies that conduct criminal background checks for employment and licensing purposes. (28 U.S.C. Section 534(a)(4)). However, in December 2004, the FBI issued an "outsourcing" policy which for the first time permits private contractors to act as "agents" of authorized federal and state agencies and perform key screening functions for non-criminal justice purposes.<sup>76</sup>

The FBI's new outsourcing policy was released in an expedited fashion to respond to the pressures on TSA to screen nearly three million licensed commercial drivers for fitness determinations required to haul hazardous material.<sup>77</sup> TSA then entered into a \$16 million contract with Computer Science Corporation to provide 40 adjudicators who will help perform the hazmat criminal background checks and fitness determinations.<sup>78</sup> To begin implementing the FBI's new outsourcing policy, the agency recently issued a Request for Information (RFI) to identify up to 50 private providers to be pre-approved as "channelers" authorized to contract with federal and state agencies to transmit fingerprints electronically to the FBI and receive and disseminate the results of the FBI's criminal records search.<sup>79</sup>

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<sup>74</sup> The National Association of Professional Background Screeners, created in 2003, is strictly a membership organization. It has created general standards of compliance with privacy protections and other screening procedures, but it has no authority to accredit firms or sanction them in anyway for non-compliance with their standards or with federal and state laws.

<sup>75</sup> "State Struggles to Keep Pace with Background Check Requests," Associated Press State & Local Wire (Maine) (April 18, 2005).

<sup>76</sup> 69 Fed.Reg. 75243 (December 16, 2004); 69 Fed. Reg. 75350 (December 16, 2004).

<sup>77</sup> 69 Fed. Reg. at 75244.

<sup>78</sup> News Release, "CSC Wins \$16 Million Contract to Support Transportation Security Administration" (February 22, 2005).

<sup>79</sup> According to the RFI, the contractor would also be entitled to charge a fee for its services, in addition to the FBI's fingerprint processing fee. The private contractor would also be responsible for resolving problems related to "incomplete or missing data on the applicants" and other issues. Vendors, Federal Business Opportunities,

We appreciate the pressures imposed on federal and state agencies to implement a new regime of criminal background checks for employment purposes. However, we are concerned that the broad authority provided by the new outsourcing policy will transfer limited resources into the private sector rather than build the capacity of federal and state agencies to make the necessary long-term investments in staff and infrastructure. Moreover, as a result of current pressures, federal and state agencies often have limited capacity to monitor and regulate contractors, which is more far likely to produce serious cost overruns.<sup>80</sup> Adopting a new contracting regime under pressure to implement extra legal mandates can also produce major errors that end up penalizing innocent workers, as in the case of the TSA contract with NCS Pearson which produced a 42% reversal rate on the part of those federal airport screeners who challenged their erroneous terminations.<sup>81</sup>

Accordingly, now is not the time to respond to the new demands for safety and security by promoting outsourcing of especially sensitive public functions involving the livelihood of millions of working families. Instead, these limited resources should be invested in federal and state agencies to build the professional experience and capacity they need to produce reliable criminal history information and the internal procedures necessary to protect employee and privacy rights.

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Thank you for the opportunity to comment on this especially timely initiative to help shape the nation's policies regulating employment screening for criminal records. As these policies fast evolve to meet the public's concern for safety and security, now is the time to ensure that stronger worker protections and meaningful employment opportunities for people with criminal records become a key priority as part of a more fair and effective regime of criminal background checks.

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Outsourcing Request for Information, Solicitation Number 06212005, Posted by the Department of Justice, Federal Bureau of Investigation, Information Technology Contracts Unit/PPMS (June 21, 2005).

<sup>80</sup> For example, according to a recent press account, "only 22 percent of homeland security contracts and programs were being supervised by managers who had the necessary training and certification," while the agency's Office of Procurement Operations has 19 employees supervising an average of \$110 million in contracts each, compared to the U.S. Coast Guard which averaged \$6.3 million in contracts per employee. "Contracting Rush for Security Led to Waste, Abuse," *Washington Post* (May 22, 2005); "The High Cost of a Rush to Security: TSA Lost Control of Over \$300 Million Spent by Contractor to Hire Airport Screeners After 9/11," *Washington Post* (June 30, 2005).

<sup>81</sup>Office of Inspector General, Department of Homeland Security, *A Review of Background Checks for Federal Passenger and Baggage Screeners at Airports* (January 2004), at page 25.